United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7468

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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P/S

GAYLE MCQUOID HOLLEY, individually and on behalf of JAMES MCQUOID, NORMAN MCQUOID, THOMAS MCQUOID, DOUGLAS MCQUOID, MICHAEL MCQUOID, and ADELAINE MCQUOID, her minor children,

Plaintiff-Appellant,

-vs-

ABE LAVINE, as Commissioner of the New York State Department of Social Services, and JAMES REED, as Commissioner of the Monroe County Department of Social Services,

Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

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POINT I

PLAINTIFF HOLLEY HAS RAISED SUBSTANTIAL CONSTITUTIONAL ISSUES WITH REGARD TO BOTH HER OWN CLAIMS AND THOSE OF HER CHILDREN

The brief submitted by counsel on behalf of appellee Lavine, the state welfare commissioner, asserts that plaintiff Holley is not lawfully residing in the United States and that, by denying welfare benefits to illegal aliens otherwise eligible, the state is merely "dealing with illegal aliens in a manner which recognizes them exactly for what they are". Brief of Appellee Lavine at p. 27. The further assertion is made that the equal protection clause is wholly inapplicable to illegal aliens and that neither a "compelling state interest" test[1] nor a "rational basis" test[2] need be met in justification of such actions. While the state concedes, as indeed it must, that many constitutional protections are extended to illegal

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1 Cf. Graham v. Richardson, 403 U.S. 365 (1971).

2 Cf. Dandridge v. Williams, 397 U.S. 471 (1969).

aliens[3], it reaffirms its position that plaintiff's claim to the comfort of the equal protection clause of the Fourteenth Amendment is "insubstantial and without merit." Brief of appellee Lavine at p. 30.

Regardless of the bold assertions made by the State as to the substantiality of plaintiff's equal protection claims, the test to be applied remains that of Hagans v. Lavine, 415 U.S. 528 (1974) and Goosby v. Osser, 409 U.S. 512 (1973), i.e., whether the claims are wholly insubstantial, essentially fictitious or obviously frivolous and whether decisions of the Supreme Court foreclose the subject. As to whether there are equal protection violations in a state plan which denies to illegal aliens welfare benefits, one well known commentator and author on immigration matters finds it an open question. In an article appearing in the California Western Law Review,

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3 See Gordon, The Alien and the Constitution, 9 California Western Law Review 1 (1972). In Flemming v. Nestor, 363 U.S. 603 (1959), the Supreme Court found the due process clause applicable to aliens already deported in determining their right to continued Social Security benefits. It applied the traditional "rational basis" test, however, and upheld the challenged statute. The Court has now said that the stricter "compelling state interest" test must be applied to classifications based on alienage, Graham v. Richardson, 403 U.S. 365 (1971).

entitled "The Alien and the Constitution", Professor Charles Gordon referred to the problem.

> The extent to which aliens in temporary or illegal status can assert a right to welfare benefits in the face of a statute which excludes them, is an issue of considerable current significance. 9 California Western Law Review at 18 (1972) (emphasis added).

Not only has there been no statement by the Supreme Court holding the equal protection clause inapplicable to illegal aliens, but plaintiff's claim to its protection is supported by the Court's treatment of due process questions and such statements of general policy as that of Mr. Justice Clark in Leng May Ma v. Barber, 357 U.S. 185 (1958):

> It is important to note at the outset that our immigration laws have long made a distinction between those aliens seeking admission, such as petitioner, and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category. 357 U.S. at 187 (emphasis added). 4

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4 See also Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953); Sailer v. Tonkin, 356 F. Supp. 72 (D.V.I. 1973).

Other courts have found that the protections of various civil rights acts apply with equal force to resident and illegal aliens as "a constitutional exercise of the power of Congress to enact appropriate legislation for the enforcement of the provisions of the Fourteenth Amendment." Martinez v. Fox Valley Bus Lines, 17 F. Supp. 576, 577 (N.D. Ill. 1936).

Under the standards enunciated in Hagans v. Lavine, supra, plaintiff's claim that the equal protection clause applies to illegal aliens and prohibits the denial of public welfare benefits based solely on an applicant's status as having entered the country unlawfully is not insubstantial and requires the convening of a statutory three-judge court.

In a like manner the claims of the plaintiff children, who are natural born citizens, raise issues of constitutionality which are not wholly insubstantial or obviously frivolous. Many federal courts have recognized that any reduction in a family A.F.D.C. grant reduces the effective amount of support provided to the children under the program.[5] While the state alleges that the plaintiff children's claim simply seeks to gain indirectly what the mother may not directly achieve, it

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[5] Cf. Cooper v. Laupheimer, 316 F. Supp. 264 (E.D.Pa. 1970)(three-judge court); Bradford v. Juras, 331 F. Supp. 167 (D. Ore. 1971)(three-judge court); Doe v. Gilman, 479 F.2d 646 (8th Cir. 1973); Shirley v. Lavine, 365 F. Supp. 818 (N.D.N.Y. 1973)(three-judge court), aff'd 95 S.Ct. 1190 (1975).

remains clear that the primary purpose of the A.F.D.C. program, and of this action, is to secure to the children the full amount of benefits to which they are entitled.[6] The Social Security Act clearly recognizes that parental guidance and supervision is a high priority and provides explicitly for payments to parents under the A.F.D.C. program. Parents are eligible for these payments, however, only because of their direct supportive relationship to an eligible child, and only so long as they remain in the household of the child. 42 U.S.C. §606(b)(1).

Under the present circumstances, children living with parents who are resident aliens or parolees receive additional moneys to provide for the needs of the parent but children living with parents in plaintiff Holley's situation are denied these benefits. The equal protection problems raised by New York's expansion of the federal rule are significant not only for the parent involved but are equally relevant to the disparate treatment accorded the children in the family. The children's claims also meet the liberal standard of Hagans, supra, and Goosby, supra.

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6 Title 42 U.S.C. §601 which provides that the primary purpose of the A.F.D.C. program is to "[encourage] the care of dependent children in their homes or in the homes of relatives..." evidences this concern.

POINT II

A CLAIM UNDER 42 U.S.C. §1983 IS PROPERLY BROUGHT AGAINST PUBLIC OFFICIALS IN THEIR OFFICIAL CAPACITIES

This Court has recognized the effect of the Supreme Court's reversal of Rosado v. Wyman, 414 F.2d 170, rev'd 397 U.S. 397 (1970), with regard to whether actions brought against state officials in their official capacities are actually actions against the state. McMillan v. Board of Education, 430 F. 2d 1145 (2nd Cir. 1970). Although the Court did not discuss the issue in its opinion, the reversal could only have been accomplished by an initial determination of the jurisdictional issue.[7]

Had it meant to affirm on the jurisdictional issue, the Court could never have reached the merits.

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7 This Court had dismissed on jurisdictional grounds as well as on the merits.

CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD BE REVERSED AND THIS MATTER REMANDED WITH INSTRUCTIONS

For the foregoing reasons the order of the district court dismissing the plaintiffs' complaint should be reversed and the matter remanded to the district court for further proceedings.

Because of the complexity of the procedural status of this case, involving a request for preliminary relief based on so-called "statutory claims" and, alternatively the convening of a three-judge district court to hear and determine plaintiffs' motion for a preliminary injunction based on the constitutional claims, plaintiffs' request that the remand include instructions. See Gumer v. Shearson, Hamill & Co., Inc., 516 F.2d 283 (2nd Cir. 1974). Plaintiffs believe appropriate instructions should require the following:

1. a timely determination of plaintiffs' request for a preliminary injunction based on the statutory claims (as set forth in sections VI,VII and IX);

2. should the single court deny plaintiffs' preliminary injunction motion, a request by the single judge that a three-judge court be convened to hear and determine plaintiffs' motion for a preliminary injunction based on the constitutional claim (as set forth in the complaint at section VIII); and

3. should the district court deny said motion, a timely determination as to whether a temporary restraining order should issue pending a three-judge court determination of plaintiffs' motion for a preliminary injunction.

In order to avoid the potential waste of judicial time and energy, plaintiffs suggest that this Court might give its view of the merits of plaintiffs' request for a preliminary injunction.

Respectfully submitted,

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Dated: Rochester, New York
November 12, 1975.

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of November, 1975, I served the foregoing Appellant's Reply Brief upon counsel for the appellees, by causing copies to be mailed, postage prepaid, to:

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Dated: November 13, 1975.